89-1159

Supreme Court, U.S.
FILED
DEC 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989.

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DANIEL FERRIS, PETITIONER

V.

THE COMMONWEALTH OF KENTUCKY, RESPONDENTS

* * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF CAMPBELL COUNTY, KENTUCKY

* * * * * * * * *

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January 19, 1990

QUESTIONS PRESENTED

1. Where a criminal defendant moves to suppress evidence of prior guilty pleas on the ground that they were not knowingly and voluntarily made, is it constitutional for a state, via the presumption of regularity of judgments, to place the burden of proof on the defendant to prove that the prior pleas were in fact constitutionally infirm?

2. Where the record surrounding a criminal defendant's plea of guilty is entirely silent, may a state court, in a subsequent proceeding, rely entirely on the fact that the defendant was represented by counsel at the time of the prior plea and thereby hold the plea valid?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Daniel Ferris, and the Respondent, Commonwealth of Kentucky.

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

* * * * * * * * *

DANIEL FERRIS,
PETITIONER

v.

THE COMMONWEALTH OF KENTUCKY,
RESPONDENT

* * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF CAMPBELL COUNTY KENTUCKY

* * * * * * * * *

The Petitioner, Daniel Ferris, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Circuit Court of Campbell County, Kentucky, entered in the above-styled proceedings on June 1, 1989.

OPINIONS BELOW

The original order of the Campbell District Court is reprinted in the appendix hereto, p. 1a, infra. [Please note: Orders of the District Court are commonly in the form of notations on the Court's calendar, as was done in this case.]

The opinion of the Campbell Circuit Court is reprinted in the appendix hereto, p. 2a, infra.

The order of the Kentucky Court of Appeals is reprinted in the appendix hereto, p.3a, infra.

The order of the Kentucky Supreme Court is reprinted in the appendix hereto, p. 4a, infra.

JURISDICTION

In the Campbell County District Court, Petitioner was charged with violation of KRS

189A.010(2)(c) (driving under the influence of alcohol) and KRS 189A.090(2A) (driving with a suspended license). Counsel for Petitioner moved to suppress evidence of two prior guilty pleas but on December 2, 1988 the District Court overruled the motion. See 1a, infra.

Petitioner appealed to the Campbell Circuit Court which affirmed the Order of the District Curt on June 1, 1989. Petitions for Discretionary Review before the Kentucky Court of Appeals and the Kentucky Supreme Court were denied on August 8, 1989 and October 11, 1989 respectively.

The jurisdiction of this Court to review the judgment of the Campbell Circuit Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The seemingly routine facts which have led to this petition may seem somewhat trivial given the scope of litigation common to this Court. Upon the firm belief, however, that no individual's constitutional rights are meaningless, certiorari is sought. In the larger sense, the issues involved in this case are so fundamental to criminal law jurisprudence, they deserve this Courts's attention.

This case began on October 5, 1988 when the Petitioner, Daniel Ferris, drove his automobile along Route 8 in Fort Thomas, Kentucky. Mr. Ferris was subsequently stopped by officers of the Fort Thomas Police Department who cited him for driving under the influence of alcohol and for

operating a vehicle while having a suspended license, violations of KRS 189A.010(c) and 198A.090 respectively. Twice before, in 1984 and in 1985, Petitioner had plead guilty to two prior DUI charges. Pursuant to Kentucky statute, Respondent sought to introduce into evidence the two prior guilty pleas and therefore enhance the sentence.[1]

The taped transcripts of the two prior pleas (84-T-2819 and 85-T-2501) revealed that the District Court merely accepted the pleas without satisfying itself that Mr. Ferris had

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[1] KRS 189A.010(3) provides: "For a third or subsequent offense within a five (5) year period, [the individual shall] be fined not less than $500 nor more than $1,000 and shall be imprisoned in the county jail for not less than 30 days nor more than 12 months and may, in addition to fine and imprisonment, be sentenced to community labor for not less than 10 days nor more than 12 months."

1988, counsel for the Petitioner moved the District Court to suppress evidence of the prior pleas on the ground that they were not knowingly made. An affidavit, signed by Petitioner, was introduced whereby he averred that he made the prior pleas without having been informed of his right to a jury trial, the right to cross-examine witnesses, the right to use the subpoena power of the court, the right to remain free from self-incrimination, and without being informed that the convictions could be used against him to enhance the penalty should he receive additional convictions within five years. The motion argued that these prior pleas were void, pursuant to Boykin v. Alabama, 395 U.S. 238 (1969).

The District Court overruled the suppression motion citing two grounds. First, the Court argued that as Mr. Ferris had been represented by counsel when he made his prior pleas, it could presume that he had been fully informed of his rights. Secondly, the Court stated that Mr. Ferris had the burden to come forward and prove that the two pleas were constitutionally invalid.

On appeal, the Campbell Circuit Court affirmed the District Court in all respects. Only two decisions were relied on, those being Dunn v. Commonwealth, Ky., 703 S.W.2d 874 (1985) and Corbett v. Commonwealth, Ky., 717 S.W.2d 831 (1986). Initially, the Circuit Court held:

> The issue presented is whether the Trial Court committed error in allowing the use of appellant's two prior convictions on guilty pleas of driving under the

influence in sentencing on the current charge. The District Court properly ruled that without any evidence of any irregularity, the burden of proof did not shift to the Commonwealth to prove that any prior guilty pleas were knowingly and voluntarily made. The burden remained on appellant until he presented evidence to rebut the presumption of regularity.

P. 2a, infra.

As to the issue of the importance of counsel at the prior pleas, the Court stated at page 3a, infra:

The record reveals that the District Court specifically found that counsel in each action was well qualified and presumed that the appellant had been informed of his rights.

. . .The District Court properly determined that representation of counsel during a guilty plea is an important factor in determining the voluntariness f the guilty plea.

Petitions for Discretionary Review were subsequently filed and denied first in the Court of Appeals, and then in the Kentucky Supreme

Court. Accordingly, this Petition follows.

Also, in the case of Dunn v. Simmons, No. 88-5015 (United States Court of Appeals, 6th Circuit, June 13, 1989) the Respondent has filed a Motion for Discretionary Review with this Court in Petition #89-707 and docketed 58 U.S. Law Week 2055 (Oct. 30, 1989). If this writ is granted or their Petition granted, the cases should be consolidated.

REASONS FOR GRANTING THE WRIT

I. AFTER PETITIONER MOVED TO SUPPRESS HIS PRIOR GUILTY PLEAS ON THE GROUNDS THAT THEY WERE MADE WITHOUT KNOWLEDGE OF HIS CONSTITUTIONAL RIGHTS, IT WAS CONSTITUTIONALLY IMPERMISSIVE TO USE THE "PRESUMPTION OF REGULARITY OF JUDGMENTS" TO PLACE THE BURDEN ON PETITIONER TO PROVE THAT HIS PLEAS WERE CONSTITUTIONALLY INFIRM.

The procedure currently in use in Kentucky is simply invalid. In Boykin v. Alabama, 395 U.S. 238, 243, this Court held:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. . . We cannot presume a waiver of these important federal rights from a silent record.

In this case the record of Mr. Ferris' pleas are entirely silent. No effort, at all, was made by the District Court Judge to satisfy himself that Mr. Ferris knew of the rights he waived by pleading guilty. Our own Kentucky Rule of Criminal Procedure, Rule 8.08 states, "[a judge] shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge." This is no novel idea, but merely a restatement of the accepted law post-Boykin. As

stated by the Sixth Circuit Court of Appeals, Boykin mandates that a conviction based on a guilty plea be reversed unless "the prosecution spreads on the record the prerequisites of a valid waiver of the constitutional rights which a defendant surrenders by pleading guilty." Roddy v. Black, 516 F.2d 1380, 1838-84 (6th Cir. 1975).

This rule is a very necessary one. To an indigent criminal defendant, a plea of guilty may appear the only way out of his or her predicament. The consequences of such an action, however, can be enormous. It is absolutely essential that the defendant realize exactly what it is he or she is about to do. To this end, it is a small burden indeed to require the prosecution and the judge to place on the record information showing

that the defendant's plea was a lucid act.

If this is not done, and the record is silent, only one conclusion can be drawn. That is, that the plea was not knowingly and voluntarily made. If the prosecution now seeks to use evidence of the prior pleas, it is their burden, and their burden alone, to prove that the pleas were valid. As stated in Sizemore v. District Court, 735 F.2d 204, 207 (6th Cir. 1984):

> . . .if a defendant argues in a post-conviction proceeding that his plea was entered without an understanding of the pleas nature and consequences, Boykin places a burden on the state to prove that the defendant's guilty plea was voluntary and intelligent.

The Kentucky courts, however, have devised a practice to work a complete reversal of this rule. Exemplified and supported by the case of Dunn v.

Commonwealth, Ky., 703, S.W.2d 874 (1985), the procedure is as follows. When a defendant argues that a prior guilty plea was constitutionally invalid, no burden shifts to the state. Instead, the presumption of regularity of judgments is invoked and the plaintiff must prove that the plea was invalid. This rule is unconstitutional.

The Dunn case was recently reviewed in Dunn v. Simons, no. 88-5015 (United States Court of Appeals 6th Circuit, June 13, 1989). In this habeus corpus action, the Sixth Circuit Court of Appeals recognized the Kentucky procedure for what it was, a very cute attempt to deprive criminal defendants of their rights. As the court found:

> Federal law governs the appropriate standards for determining whether a plea of guilty is intelligent and voluntary for purposes of the United States

Constitution. . . . Because the circumstances surrounding the acceptance of a guilty plea necessarily must be examined, federal standards control the limited fact-finding role required of the court in arriving at a determination of this question of law. In view of Boykin and Roddy, we conclude that among those standards must be counted these: Where the record from the trial court is inadequate to affirmatively demonstrate that the plea was intelligent and voluntary, the state may not utilize a presumption to satisfy its burden of persuasion. And, where it seeks to satisfy that burden by supplementing an incomplete contemporaneous record with extrinsic evidence, that evidence must be clear and convincing. Id. at 4. [Emphasis added]

The Sixth Circuit's message was well said. The state may not seek to place its burden onto the shoulders of criminal defendants. After all, it is no burden whatsoever, to make a record complete and conclusive in regard to a defendant's guilty plea. If this isn't done, the state's burden to prove the pleas'

validity is harsh. This is as it should be.

II.WHERE PETITIONER'S RECORD WAS ENTIRELY SILENT, THE STATE COULD NOT RELY SOLELY UPON THE FACT THAT PETITIONER'S PRIOR GUILTY PLEAS WERE MADE WITH COUNSEL PRESENT AND THEREBY DECLARE THEM VALID.

When Petitioner plead guilty in 1984 and 1985, it is unquestioned that he was both times represented by counsel. No one argues that this is not a factor to look at in deciding the issue of whether the pleas were knowingly made. The fact of the matter is, however, that this fact alone cannot substitute for a clear record.

By affidavit, Mr. Ferris swore under oath that no one informed him of the rights he relinquished by pleading guilty. The prosecution offered no evidence to dispute this. The District Court, on its own, noted the fact of

prior representation and presumed and assumed that Defendant had been informed of his rights and based on this assumptionh overruled Defendant's motion.

The Boykin rule was designed as a safeguard for criminal defendants and the duties it imposed were directed at prosecutiorial teams and state judges. Nowhere did the rule place a duty on defense counsel. As this Court is well aware, defendants often enter guilty pleas not only with, but on the advice of counsel. To suggest that such representation alone can take the place of an on-the-record inquisition by the trial judge, is to ignore the real-world practices of courtrooms throughout this country. Such a rule would, with a wink and a nod, render the Boykin case a

nullity in a vast number of cases.

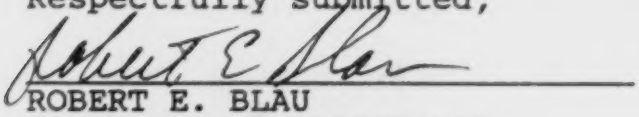
Indeed, it should be remembered that the defendant in the Boykin case was represented by counsel when he made his historic guilty plea. Boykin, supra at 239.

Like the defendant in Boykin, Mr. Ferris' representation by counsel was not sufficient, in and of itself, to render his pleas knowing and voluntary.

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. There is an immediate need for a clear, and final, statement as to the modern status of Boykin.

Respectfully submitted,



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CALENDAR

Commonwealth of Ky. Date:12/2/88
Court of Justice Time:10:30a.m.
Room: 1

Laurie Dowell, Asst. Co. Atty.
Judge Lambert Hehl, Judge

Motion Hearing

88-T-3581 Daniel Ferris	O.R.
Ft. Thomas 10/5/88	J.T.
Bray	10:30
BA-Refused DOB: 6/8/50	1/4
Atty: Berry	3

Judge Signature: /s/ Lambert Hehl

Date: 12/2/88

OPINION

COMMONWEALTH OF KENTUCKY
CAMPBELL CIRCUIT COURT
SECOND DIVISION
CASE NO. 89-X-004

COMMONWEALTH OF KENTUCKY
Appellee/Plaintiff

-vs-

JUDGMENT

Entered June 1, 1989

DAN FARRIS
Appellant/Defendant

This is an appeal from the Campbell District Court where the defendant entered a conditional guilty plea reserving for appeal the issue concerning defendant's motion to suppress the prior guilty pleas for driving under the influence.

The issue presented is whether the Trial Court committed error in allowing the use of appellant's two prior convictions on guilty pleas of driving under the influence in sentencing

on the current charge. The District Court properly ruled that without any evidence of any irregularity, the burden of proof did not shift to the Commonwealth to prove that any prior guilty pleas were knowingly and voluntarily made. The burden remained on appellant until he presented evidence to rebut the presumption of regularity. Although the case involved a felony charge of persistent felony offender, the case of Dunn v Commonwealth, Ky., 703 SW2d 874 (1985), gives guidance. After the Commonwealth proves the judgments of convictions in each of the previous underlining offenses upon which it intends to rely, the presumption of regularity of judgment shall be sufficient to meet the original burden of proof. The burden then shifts to the defendant. The Trial Court in this case

properly ruled that the mere filing of the affidavit, absent any other proof whatsoever, was not enough to shift the burden over to the Commonwealth. The Trial Court properly ruled that appellant had to give some evidence that would overcome the presumption of regularity.

Appellant also argues that he was not advised of his right to a jury trial, right to cross examine, use of the subpoena power, self incrimination rights, and that a conviction could be used against him to enhance the penalty. Appellant submitted that information in an affidavit. Appellant did not present testimony or other evidence at the motion to suppress. The record reveals that the District Court specifically found that counsel in each action was well qualified and presumed that the appellant had been

informed of his rights. Although involving a conviction for persistent felony offender, the case of Corbett v Commonwealth, Ky., 7171 SW2d 831 (1986), offers guidance. The Trial Judge in this case found that Mr. Farris had retained counsel in the prior driving under the influence guilty pleas. The District Court properly determined that representation of counsel during a guilty plea is an important factor in determining the voluntariness of the guilty plea.

Accordingly, **IT IS ORDERED**, that the Trial Court Judgment overruling defendant's motion to suppress

be and the same hereby is affirmed.

/s/ Leonard L. Kopowski-
Chief Justice

c.c. Mr. Robert E. Blau
Ms. Laurie Dowell
Hon. Lambert Hehl, District Judge

I, Thomas J. Calme, Clerk of the Campbell Circuit Court do hereby certify that a true and correct copy of the foregoing Judgment entered June 1, 1989 has been sent this 1st day of June, 1989 to the following persons: Thomas J. Calme, Clerk, Robert E. Blau, Laurie Dowell, and Hon. Lambert Hehl, District Judge.

THOMAS J. CALME, CLERK

BY;/s/Joanne Rowland,D.C.

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 89-ca-1273-D

DAN FERRIS MOVANT

v ON MOTION FOR DISCRETIONARY REVIEW FROM CAMPBELL CIRCUIT COURT
ACTION NO. 89-XX-4

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * * * * *

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: McDONALD, CLAYTON AND MILLER, JUDGES

Having considered the movant's motion for discretionary review and the response thereto, and being otherwise sufficiently advised, the Court ORDERS the motion be, and it is hereby, DENIED.

ENTERED: August 8,1989

/s/Michael O.McDonald
Judge, Court of Appeals

SUPREME COURT OF KENTUCKY

89-SC-632
(89-CA-1273)

DAN FERRIS MOVANT

V. CAMPBELL CIRCUIT COURT
89-XX-04

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for a review of the decision of the Court of Appeals is denied.

ENTERED: October 11,1989.

/s/Robert F. Stephens
Chief Justice